JOHN B. GOLPER - State Bar No. 065963
JEFFREY P. FUCHSMAN - State Bar No. 105651
BALLARD, ROSENBERG & GOLPER
10 Universal City Plaza, Suite 1650
Universal City, California 91608-1097
(818) 508-3700

Attorneys for Defendants
ANHEUSER-BUSCH, INC., ROBERT WARNER,
GEORGE LOGAN, and RUSS WHITMEYER
AND ASSOC., INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
Clerk, U.S. District Court
JUL 8, 1996
Central District of California
By /s/ Deputy

FRED CAMERON, JEFF BOWER,
DAN MCWILLIAMS, DAVID CORTEZ,
Plaintiffs,

vs.

ANHEUSER-BUSCH, INC., ROBERT WARNER,
GEORGE LOGAN, RUSS WHITMEYER AND
ASSOC., INC., and DOES 1 through 100, inclusive,
Defendants.

Case No. 95-8651 AAH (Mcx)

DEFENDANTS ANHEUSER-BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, AND RUSS WHITMEYER AND ASSOC., INC.'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR, ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT; ORDER THEREON

Date: July 8, 1996
Time: 10:00 a.m.
Ctrm: 15

PTC Date: None
Trial Date: None

Defendants ANHEUSER-BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, and RUSS WHITMEYER AND ASSOC., INC. lodge this Statement of Uncontroverted Facts and Conclusions of law in support of their Motion for Summary Judgment, or, Alternatively, Partial Summary Judgment pursuant to Local Rule 7.14.1.

I. UNCONTROVERTED FACTS

A. THE PLAINTIFFS WERE ALL EMPLOYED PURSUANT TO A CBA WITH ABI AND THEIR RESPECTIVE UNIONS

Uncontroverted Facts **Evidence**

1. Plaintiff FRED CAMERON ("CAMERON") was employed with ABI pursant to a CBA between ABI and the International Association of Machinists, District Lodge 94 ("IAM").

Warner Decl.: ¶ 3, and Exhibit "1" thereto; Response to Admission No. 1 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

2. Plaintiff JEFF BOWER ("BOWER") was employed with ABI pursuant to a CBA between ABI and the International Union of Operating Engineers, Local 501 ("IUOE").

Warner Decl.: ¶ 3, and Exhibit "3" thereto; Response to Request for Admission No. 1 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

3. Plaintiff DAN MCWILLIAMS ("MCWILLIAMS") was employed with ABI pursuant to a CBA between ABI and the International Brotherhood of Electrical Workers, Local 2291 ("IBEW").

Warner Decl.: ¶ 3, and Exhibit "4" thereto; Response to Request for Admission No. 1 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

4. Plaintiff DAVID CORTEZ ("CORTEZ") was employed with ABI pursuant to a CBA between ABI and IBEW.

Warner Decl.: ¶ 3, and Exhibits "4" thereto; Response to Request for Admission No. 1 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24" and "25" thereto.

5. The CBA between ABI and the IAM provides that ABI may discharge employees for "just cause."

Warner Decl.: ¶ 4, and Exhibit "1" thereto.

6. The IAM CBA also contains a grievance and arbitration procedure to challenge ABI's alleged violations of the CBA.

Warner Decl.: ¶ 4, and Exhibit "1" thereto.

7. Although the IAM CBA does not contain an express "management rights" clause, in a recent arbitration between ABI and the IAM, an Arbitrator concluded that ABI had an inherent implied management right to unilaterally implement work rules.

Warner Decl.: ¶ 4, and Exhibit "2" thereto.

8. The CBA with the IUOE provides that ABI may terminate employees for "good cause".

Warner Decl.: ¶ 5, and Exhibit "3" thereto.

9. The CBA with the IUOE also contains a grievance and arbitration procedure to challenge alleged violations of the CBA.

Warner Decl.: ¶ 5, and Exhibit "3" thereto.

10. The CBA with the IBEW provides that "The Company has and will retain the right to manage the plant and direct the working forces, including the right to hire, suspend, or discharge for just cause . . ."

Warner Decl.: ¶ 6, and Exhibit "4" thereto.

11. The IBEW CBA also contains a grievance and arbitration procedure to address alleged violations of the CBA.

Warner Decl.: ¶ 6, and Exhibit "4" thereto.

B. PLAINTIFFS FILED GRIEVANCES UNDER THE CBA ARISING FROM THE AUGUST 18, 1995 SEARCH

12. CAMERON has filed a grievance against ABI pursuant to the IAM CBA challenging his discharge as a result of the same August 18, 1995 search incident which is also the subject of this lawsuit.

Warner Decl.: ¶ 7, and Exhibit "5" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

13. CAMERON's grievance is scheduled to be submitted to binding arbitration in accordance with the arbitration procedure set forth in the CBA with the IAM on April 30, 1996.

Warner Decl.: ¶ 7, and Exhibit "5" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

14. BOWER has filed a grievance under the CBA challenging his discharge as a result of the August 18, 1995 search operation.

Warner Decl.: ¶ 8, and Exhibit "6" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

15. BOWER's grievance was submitted to binding arbitration pursuant to the arbitration procedure in the IUOE CBA, commencing on April 17, 1996.

Warner Decl.: ¶ 8, and Exhibit "6" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "18", "19", "20"); Fuchsman Decl.:

¶ 7, and Exhibits "18", "19", "20" thereto.

16. Although MCWILLIAMS was not disciplined as a result of the August 18, 1995 search, MCWILLIAMS has filed a grievance against ABI under the CBA which challenges ABI's general conduct.

Warner Decl.: ¶ 9, and Exhibit "7" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

17. MCWILLIAMS's grievance was not pursued to arbitration by his Union.

Warner Decl.: ¶ 9, and Exhibit "7" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

18. CORTEZ has not filed a grievance with respect to the August 18, 1995 search.

Warner Decl.: ¶ 10; Response to Request for Admission Nos. 3, 4 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24", "25" thereto.

C. PLAINTIFFS ADMIT THAT THEIR UNIONS HAVE NOT BREACHED THE DUTY OF FAIR REPRESENTATION

19. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging the termination of your employment with ABI", CAMERON responded "Admit".

Response to Request for Admission No. 5 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

20. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging the termination of your employment with ABI", BOWER responded "Admit".

Response to Request for Admission No. 5 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

21. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging ABI's August 18, 1995 search of your vehicle and person", MCWILLIAMS responded "Admit".

Response to Request for Admission No. 5 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

22. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to your alleged false imprisonment by ABI on August 18, 1995", CORTEZ responded "Admit".

Response to Request for Admission No. 5 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24", "25" thereto.

D. DEFENDANTS WARNER, LOGAN AND WHITMEYER ARE ALLEGED TO HAVE ACTED ON BEHALF OF ABI AND IN THE COURSE AND SCOPE OF THEIR AGENCY OR EMPLOYMENT WITH ABI

23. Defendant ROBERT WARNER ("WARNER") is employed as ABI's Human Resources Manager at the Los Angeles Brewery.

Warner Decl.: ¶ 2; Complaint, ¶ 4 (Exhibit "12").

24. Defendant GEORGE LOGAN ("LOGAN") is employed as ABI's Assistant Human Resources Manager at the Los Angeles Brewery.

Warner Decl.: ¶ 2; Complaint, ¶ 4 (Exhibit "12").

25. Defendant RUSS WHITMEYER AND ASSOC., INC. ("WHITMEYER"), was retained by ABI to assist with the August 18, 1995 search operation.

Warner Decl.: ¶ 14; Complaint, ¶ 5 (Exhibit "12").

26. Plaintiffs' claims against Defendant WARNER are based on WARNER's alleged conduct in the course and scope of his employment with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 4, 7, 17, 33 (Exhibit "12").

27. Plaintiffs' claims against Defendant LOGAN are based on LOGAN's alleged conduct in the course and scope of his employment with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 4, 7, 12, 13, 14, 31, 36, 37 (Exhibit "12").

28. Plaintiffs' claims against Defendant WHITMEYER are based on WHITMEYER's alleged conduct in the course and scope of its agency with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 5, 7, 31, 36, 37 (Exhibit "12").

E. ABI'S ESTABLISHED SEARCH POLICY

29. For at least ten years, ABI has posted signs on the employee entrances and exits at both the Woodley Avenue and Haskell Street hourly employee parking lots advising employees of ABI's right to search employees and their property, including vehicles parked on ABI property.

Warner Decl.: ¶ 11, and Exhibits "8", "9" thereto.

30. If employees do not wish to have their cars subject to search by ABI, they do not have to park on ABI property as there are approximately 40 to 50 parking spaces available on the street outside the Brewery.

Warner Decl.: ¶ 11.

31. The signs are placed next to the turnstiles used by the hourly employees to enter or leave the Brewery grounds from the parking lot, and employees have to walk past the signs when they enter or leave the Brewery every single day.

Warner Decl.: ¶ 11, and Exhibits "8", "9" thereto.

32. ABI posted additional signs on the outside perimeter of the employee parking lots on August 14 and 15, 1995.

Warner Decl.: ¶ 11, and Exhibits "10", "11" thereto.

33. The perimeter signs are visible from the street, and also advise employees of ABI's right to search employees and their vehicles parked on ABI's property.

Warner Decl.: ¶ 11, and Exhibits "10", "11" thereto.

34. For years, employees leaving the facility with bags or packages have been searched by security guards on a random basis.

Warner Decl.: ¶ 12.

35. Employees refusing to allow the search have been consistently disciplined, including employees that are represented by the Plaintiffs' Unions.

Warner Decl.: ¶ 12.

36. ABI conducted an employee locker room search in approximately 1984 using trained "sniff dogs".

Warner Decl.: ¶ 12.

37. ABI's management right to conduct these searches, or to discipline employees as a result of the search or for refusing to allow the search, has never been challenged by the Plaintiffs' Unions prior to August 18, 1995.

Warner Decl.: ¶ 12.

F. THE AUGUST 18, 1995 SEARCH

38. ABI prohibits the use or possession of illegal drugs in the workplace.

Warner Decl.: ¶ 13.

39. In July 1995, ABI initiated a comprehensive drug program which included drug awareness training and drug testing for salaried employees in "safety-sensitive" positions, and sweeps of the employee parking lots with sniff dogs trained to detect drug residue in the vehicle.

Warner Decl.: ¶ 13.

40. Procedures for drug testing of hourly employees, such as Plaintiffs, are specified in the CBA's.

Warner Decl.: ¶ 13, and Exhibits "1", "3", "4" thereto.

41. ABI maintains that its right to search employees and their property on ABI premises, including vehicles, is an

inherent management right which has been exercised by ABI for over a decade without objection by the Unions.

Warner Decl.: ¶ 13.

42. ABI's anti-drug program was the subject of significant discussion at the Brewery for several weeks prior to the August 18, 1995 search.

Warner Decl.: ¶ 13.

43. ABI retained WHITMEYER, a company with substantial experience assisting employers with drug elimination programs, to participate in the parking lot sweeps.

Warner Decl.: ¶ 14.

44. On August 18, 1995, WHITMEYER deployed several agents with dogs trained to detect drug residue to sniff the vehicles parked in the employee parking lots.

Warner Decl.: ¶ 14.

45. If the dogs identified a vehicle as "positive" for drug residue, ABI determined the owner's identity, the employee was taken to a private room and asked to consent to a search of the vehicle, and if the employee was represented by a Union, the employee's Union Steward was also present.

Warner Decl.: ¶ 14.

46. The suspected employee was also asked to consent to a search of his person which generally consisted of the employee removing his shoes and socks and emptying his pockets, and an examination of other personal belongings that are typically used to hide drugs.

Warner Decl.: ¶ 14.

47. If the suspected employee refused to consent to the search, of if illegal drugs or drug paraphernalia were discovered in the search, the employee was suspended subject to termination.

Warner Decl.: ¶ 14.

48. Since the parking lot operation commenced at approximately 4:30 p.m. on August 18, 1995, after the swing shift began, the majority of the employees from the day shift already had left the facility, and most of the employees working swing shift already had arrived before the operation began.

Warner Decl.: ¶ 15.

49. Except during shift changes when there is heavy employee traffic, the entrances/exits to the employee parking lots are ordinarily kept closed, and employees that need to enter or leave the parking lot at such times must be let in or out by the security guards posted in the parking lot.

Warner Decl.: ¶ 15.

50. To facilitate the August 18, 1995 search operation, the employee entrances/exits to the parking lots were closed while the parking lots were checked, and the electronic turnstile that hourly employees generally use to exit into the parking lot from the Brewery grounds was in manual mode during the search operation.

Warner Decl.: ¶ 16.

51. If an employee wanted to leave, and his car was parked in a section of the lot that was already sniffed by the dogs, the employee was allowed to proceed through the turnstile and leave the parking lot.

Warner Decl.: ¶ 16.

52. If the employee was parked in a section of the lot that had not yet been sniffed for drugs, the employee had to wait until arrangements could be made for his car to be sniffed and cleared, and was then permitted to leave the parking lot.

Warner Decl.: ¶ 16.

53. Limiting access in and out of the parking lot only affected a relatively small number of employees that arrived late for swing shift, or day shift employees that worked overtime into the swing shift.

Warner Decl.: ¶ 16.

54. At all times during the search operation, employees were free to leave the Brewery facility on foot through the delivery entrance on Woodley Avenue.

Warner Decl.: ¶ 16.

55. Although the following scenario did not occur during the August 18, 1995 search, if an employee insisted on leaving the parking lot in his vehicle before it could be sniffed, the employee would have been permitted to leave but would have been subject to disciplinary action.

Warner Decl.: ¶ 16.

56. BOWER and CORTEZ were day shift employees that worked overtime on August 18, 1995 into the swing shift while the search operation was underway.

Warner Decl.: ¶ 17.

57. CORTEZ's vehicle was parked in a section of the Haskell Street parking lot that had already been sniffed, and CORTEZ was permitted to leave the facility although he chose to stay.

Warner Decl.: ¶ 17.

58. Because BOWER's vehicle was parked in a section of the Haskell Street lot that had not yet been sniffed when he wanted to leave, BOWER had to wait by the turnstile while arrangements were made for his vehicle to be sniffed.

Warner Decl.: ¶ 18.

59. After BOWER's vehicle was identified as "positive" by the dog team, BOWER was brought to a private room along

with his Union Steward, and was asked to consent to a search.

Warner Decl.: ¶ 18.

60. After BOWER signed a consent form to allow the search, a search of BOWER's vehicle resulted in the discovery of drug paraphernalia; specifically a "roach clip" and rolling papers.

Warner Decl.: ¶ 18.

61. BOWER was suspended pending further investigation, and was later terminated for violation of ABI's policy prohibiting drugs and drug paraphernalia on company property after the roach clip was sent to a laboratory and tested "positive" for marijuana.

Warner Decl.: ¶ 18.

62. CAMERON was a swing shift employee whose vehicle was also identified as "positive" by the dog team.

Warner Decl.: ¶ 19.

63. CAMERON was brought to a private room along with his Union Steward, and was asked to consent to the search.

Warner Decl.: ¶ 19.

64. CAMERON refused to give consent, was suspended at that time, and then terminated for refusing to consent to the search.

Warner Decl.: ¶ 19.

65. MCWILLIAMS was another swing shift employee whose vehicle was identified as "positive" by the dog team.

Warner Decl.: ¶ 20.

66. MCWILLIAMS was brought to a private room along with his Union Steward, and was asked to consent to the search.

Warner Decl.: ¶ 20.

67. MCWILLIAMS signed the consent form, and a search was conducted.

Warner Decl.: ¶ 20.

68. Although MCWILLIAMS's vehicle had been identified as "positive" for drug residue by the dog team, no drugs or paraphernalia were discovered in the search, and MCWILLIAMS did not receive any discipline as a result of the search.

Warner Decl.: ¶ 20.

II. CONCLUSIONS OF LAW

1. Plaintiffs' first cause of action for invasion of privacy is preempted by Section 301 of the Labor Management Relations Act, as amended ("LMRA"), 29 U.S.C. § 185.

2. Plaintiffs' second cause of action for false imprisonment is preempted by Section 301 of the LMRA.

3. Plaintiffs' third cause of action for defamation is preempted by Section 301 of the LMRA.

4. Plaintiffs' fourth cause of action for intentional infliction of emotional distress is preempted by Section 301 of the LMRA.

5. Plaintiffs' fifth cause of action for wrongful termination in violation of public policy is preempted by Section 301 of the LMRA.

6. To the extent Plaintiffs' state law claims are characterized as claims arising under Section 301 of the LMRA, the claims are legally barred because Plaintiffs' exclusive remedy is under the grievance and arbitration procedure set forth in the CBA's governing their employment.

7. To the extent Plaintiffs' state law claims are characterized as claims arising under Section 301 of the LMRA, the

claims are legally barred because Plaintiffs cannot establish that their respective Unions have breached the duty of fair representation, an essential element for the Section 301 claim.

SO ORDERED.

DATED: 7/8/96

/s/ A. ANDREW HAUK
HONORABLE A. ANDREW HAUK
United States District Judge

Presented by: Dated: May 6, 1996

BALLARD, ROSENBERG & GOLPER
JOHN B. GOLPER
JEFFREY P. FUCHSMAN

By /s/ JEFFREY P. FUCHSMAN
JEFFREY P. FUCHSMAN
Attorneys for Defendants
ANHEUSER-BUSCH, INC., ROBERT
WARNER, GEORGE LOGAN, and
RUSS WHITMEYER AND ASSOC., INC.